United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7567

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

THOMAS W. EGGERT,
Plaintiff-Appellant,

VS.

NORFOLK & WESTERN RAILWAY COMPANY and
ERIE LACKAWANNA RAILWAY COMPANY,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF-APPELLANT

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CASES CITED

PRELIMINARY STATEMENT OF FACT

This is an appeal from a judgment on a jury verdict duly entered on the 14th day of October, 1976, in the United States District Court for the Western District of New York, in the case of Thomas W. Eggert v. The Norfolk & Western Railway Company and the Erie Lackawanna Railway Company, Civil 1973-370. The appellant is appealing the decision of the jury in this case, in which the jury found that there "is no cause of action for negligence" (p. 582a l. 25 and 583 a, l. 1)* and "no violation of the Boiler Inspection Act in regard to the placement of the brake valve and defective seat." (p. 591 a. 11 7-10).

Plaintiff, Thomas W. Eggert commenced the original action herein by filing a summons and complaint, Civil 1973-370, on the 30th day of January 1974 in the Federal District Court for the Western District of New York. The original trial was commenced before the Honorable Judge John T. Elfvin sitting with a jury on October 29th, 1975. At the close of plaintiff's case, the Honorable Judge John T. Elfvin granted defendants' motion for a directed verdict and accordingly entered a "judgment on decision by the Court" on the 30th day of October 1975. The plaintiff filed a notice of appeal from this "judgment on decision by the Court" on the 26th day of November 1975. The case was docketed for the Second Circuit Court of Appeals, No. 870, Docket 75-7675, the briefs were filed and argument was heard on April 19th 1976. A decision reversing and remanding the case to the Federal District

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*All references to pages and lines refer to the original trial record and other pleadings reproduced in the appendix to the appeal herein.

Court for the Western District of New York for a new trial was handed down on June 25, 1976. The Second Circuit Court of Appeals, in a decision reported at 538 F 2d 509, speaking through the Honorable Justice Hays ruled that:

1. That the evidence in the plaintiff's Federal Employer Liability case should be viewed in the light most favorable to plaintiff;

2. That it was reversible error to prevent submission of the issue of the defendant railroads' negligence to the jury; and

3. That evidence with respect to the practice of other railroads with respect to brake valve guards was highly relevant since the existence of alternatives would be significant on the issue of whether the defendant railrods acted reasonably in failing to provide a guard on the engine.

The Court also concluded that it was reversible error to exclude evidence which tended to establish plaintiff's claim as set forth in his complaint and answer to interrogatories. (538 F. 2d at 512) The Honorable Justice Mansfield, Circuit Judge concurred in a separate opinion with the majority on the third point, ruling that exclusion of revelant evidence offered to substantiate plaintiff's claim of negligence as spelled out in his interrogatories was reversible error. (538 F. 2d 512)

The plaintiff commenced his second trial of this action on October 5, 1976, before the Honorable Justice John T. Elfvin. Subsequent trial proceedings were held on the 6th, 7th, and 13th days of October, 1976.

On October 13th, 1976, the jury returned a verdict of no cause of action for negligence and no violation of the Boiler Inspection Act. The appellant filed a notice of appeal from the decision on the

4th day of November , 1976, Docket 76-7567. Because of extenuating circumstances, as set out in two affidavits, the Second Circuit granted plaintiff's request for an extension of time to file a brief. Plaintiff's brief is now timely before this Court for its determination of the issues raised therein.

The appellant is appealing the judgment on the jury verdict duly rendered in this case because of substantial errors of law which were committed by the trial judge, the Honorable Justice John T. Elfvin. It is the appellant's position that the serious legal errors of the court, not only resulted in the denial of a fair and equitable trial to the plaintiff herein, but if allowed to remain uncorrected, would result in the denial of a fair and equitable trial to future F.E.L.A. litigants that appear before the Honorable Justice John T. Elfvin to exercise their legal rights under that statute and the Federal Safety Appliance and Boiler Inspection Acts (45 USC 23, 51 et al).

STATEMENT OF FACTS

The Appellant, Thomas W. Eggert, an engineer on the Erie Lackawanna Railroad was injured on the 22nd day of June 1971 while making a switching movement.

Mr. Eggert reported to work on the 21st day of June 1971 at 10:30 p.m., as an engineer on a yard job at Halstead Avenue in Buffalo, New York. Mr. Eggert was a promoted engineer with approximately seventeen years seniority, but on that night assumed the position of fireman and allowed his fireman, Mr. Kendall, also a promoted engineer, to operate the engine. The ground crew, an extra crew, was performing a switching movement in the yard when Mr. Eggert sustained an injury to his left knee.

At approximately 2:30 a.m. on the 22nd day of June, 1971, Mr. Kendall, while operating Norfolk & Western Engine 2500 informed Mr. Eggert that the ground crew was out of sight. Mr. Kendall then began to stop the engine and asked Mr. Eggert to check to see if he could see the crew. Mr. Eggert was seated in the front seat of the engine on the fireman's side at this time. Ordinarily Mr. Eggert would have been seated in the rear seat because of the direction they were moving in. However, because the front seat was defective and was cocked at an angle, thereby leaving no leg room between the seats which could have resulted in Mr. Eggert injuring his knees had he sat in the rear seat, Mr. Eggert was forced to sit in the defective front seat. At the time of the accident, Mr. Eggert was in the process of moving from the defective seat that would not swivel to the back seat in order to check on the crew and facilitate communication between

himself and the engineer. At the time Mr. Eggert got up to move, Mr. Kendall abruptly decelerated the engine, thereby causing the slack to run in and knock Mr. Eggert off balance. Mr. Eggert was thrown back into the cocked front seat which would not turn. He glanced off the seat, struck the wall of the engine and fell striking his left knee on an unguarded protruding brake valve.

As a result of the accident Mr. Eggert suffered a traumatic injury to his left knee, which eventually required surgery. Mr. Eggert missed approximatley six months of work from June 21, 1971 until early January 1972. He then worked on and off until June of 1972 at which time he was hospitalized and operated on for torn cartlidge of the left knee. Mr. Eggert remained off work another six months and returned as an engineer on January 4, 1973. Mr. Eggert has been diagnosed by his physician, Dr. Godfrey, to have a partial permanent disability of the left knee. Because of this disability, Mr. Eggert testified that he has had to take time off from work sporadically during the years and will have to continue to do so in the future.

Plaintiff presented his case in the second trial which commenced on October 5, 1976 claiming that:

1. A violation of the Boiler Inspection Act, 45 USC 22 et al contributed to his injury, in that the defendants caused him to work on a locomotive which was not safe to operate without unnecessary peril to life or limb; and

2. That a violation of the Federal Employer Liability Act, 45 USC 51 et al, contributed to his injury in that the defendants and/or their agents were negligent in that there was an unsafe switching

movement and unsafe operation and deceleration of the train and that they failed to properly inspect, repair and maintain locomotive N & W 2500 thereby causing plaintiff to fall against a defective seat and brake valve when the slack ran in.

Plaintiff claimed that as a result of this negligence of the defendant and/or its agents, that the railroad failed to live up to its non delegable duty to provide him with a safe place to work.

After considerable colloquy during the trial on the applicable law to be applied; the right of plaintiff to subpoena documents; the type of evidence to be allowed into the case; the type of witnesses to be called; the form and substance of the pre-trial statement; requested charges of both parties; and the request of plaintiff to submit interrogatories to the jury along with considerable other legal issues which will be developed more fully herein, the case was finally submitted on October 13, 1976, to the jury.

The jury returned a verdict of no cause of action for negligence (582a 11 1, 583a 11) but admittingly failed to consider plaintiff's claim as to a violation of the Boiler Inspection Act. (583a 11 2-5). The Court, after further refusing to use plaintiff's interrogatories to help clarify the issues (585a -1 4) sent the jury out again at 5:03 p.m. After approximately thirty minutes, the jury returned and asked the Court to "Please clarify what points we are to consider concerning labor laws: (586a - 11 5-6). After an attempt by the Court to clarify the "labor laws" or Boiler Inspection Act, the jury retired at 5:50 p.m. for futher deliberations. At 6:21 p.m. the jury returned with its additonal verdict of "no violation of the Boiler Inspection Act in regard to the placement of the brake valve and

defective seat." (591a 11. 8-10)

An order and judgment on the jury verdict was filed on October 14, 1976. The case is now before this Court on appeal.

POINT I

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING PLAINTIFF'S REQUEST FOR A CONTINUANCE IN ORDER TO ALLOW THE DEFENDANTS TO PROPERLY RESPOND TO THE SUBPOENA DUCES TECUM SERVED ON THEM BY THE PLAINTIFF.

On October 1st, 1976, the plaintiff herein properly served on the defendants a subpoena duces tecum (Appendix E 603a - 606a) requesting among other things that the defendant railroads produce "all inspection and repair or work reports of N&W locomotive No. 2500 for the year 1971; and in particular reports showing damage to the inside of the cab of this locomotive and all accident and repair reports wherein employee, Harold Parker, was injured while an employee of Erie Lackawanna Railway Company, while working on N&W locomotive prior to June 21, 1971.

This Court has long recognized the proposition that strong public policy expounded by both the United States Supreme Court and the Second Circuit Court of Appeals favors techniques and procedures designed to reach the truth. The power of the subpoena provided under Rule 45 of the Federal Rules of Civil Procedure is an essential instrument of evidence locating and fact-finding. In a F.E.L.A. and Boiler Inspection case such as the one at bar, in which the railroad has almost total control of all relevant documents, the subpoena duces tecum is the one instrument available to the plaintiff which allows him to secure the original documents, records, and reports which are often necessary to prove his case. The injured railroad employee, as in the

case of Mr. Eggert, is often at a decisive disadvantage in regards to the securing and compiling of necessary documentary evidence to substantiate his claim. He often finds himself unable to conduct any type of inquiry into the circumstances surrounding the accident due to the very fact of his own disabiling injuries and the reluctance of other railroad employees to discuss matters which might result in their being disciplined for assisting an injured employee in his claim against "the Company". On the other hand, the railroad has its own paid claim agent, who is immediately on the scene, who has immedaite access to all company documents and records; who has immediate access to and knowledge of all witnesses; who has immediate access to inspect and photograph the accident scene or equipment involved; who often takes an immediate statement from the injured employee under guise of "Company Rules" and threatened discipline; and then immediately delivers him to the "Company Doctor" for immediate medical note taking about the facts of the accident along with treatment and diagnosis. The employee is often treated thusly eventhough the employee often requests his own doctor or hospital and does not feel up to talking about the accident.

As in the case at bar, most injured employees also finds themselves at a loss as to what to do about their accident. They are not trained in the F.E.L.A. and Safety Appliance Acts as the claim agent is. They are not trained as lawyers are in the skills of securing necessary facts and evidence along with witnesses' statements concerning the

accident. In most cases, as in the case at bar where they are working with extra men, they cannot even remember all the names of their crew members. If a lawyer is retained it is usually some time after the initial events when the facts and circumstances and witnesses are no longer fresh. The retained lawyer himself often experiences difficulties in obtaining the factual evidence. Unless a law suit is commenced, he has no access to the company property, records, documents and other data. Even after the lawsuit is commenced, the private lawyer is still hampered by the railroad's refusal to allow discovery. Eventhough he is on a contingency fee basis and very often has no money put forth by the client to cover the expenses of discovery, he must often engage in extended and costly pre-trial discovery methods, consisting of examinations before trial, demands for interrogatories, discovery motions and other costly procedures in order to adequately prepare his client's case.

In the case at bar, plaintiff's counsel had approximately three months to prepare a case which the railroad had lived with for approximately five years. Besides the initial on the scene investigation the railroad claim agent had preformed in June of 1971, they had also prepared for and defended the first trial in this action. Plaintiff's present counsel became involved on an active litigation basis only after this Court's decision of June 25th, 1976, approximately five years after the accident. As was pointed out to this Court in previous affidavits filed with the Court by plaintiff's counsel concerning his appeal that eventhough this Court had awarded plaintiff's counsel

costs of the first appeal, which money would have assisted plaintiff's counsel in defraying the cost of preparing this case for the second trial, the money has not yet been forthcoming. It is with this background in mind that this Court should consider the defendants' failure to properly respond to plaintiff's subpoenas served on them on October 1, 1976, and grant plaintiff the appropriate relief of a new trail and production of the requested documents.

Plaintiff requested in the subpoena that the defendant railroads produce daily locomotive inspection and repair reports for Engine N&W #2500 in the year 1971. These reports were subpoened to ascertain whether or not any defects to the front seat on N&W Engine #2500 were either:

1. discovered through daily locomotive inspection;
2. repaired by the railroad; or
3. reported to the proper officials for appropriate remedial action.

It was plaintiff's contention in paragraph #9 of the Answer to Interrogatories (604a, appendix E) that "the defendant, Erie Lackawanna Railroad "failed to properly inspect the said engine and filed to dispatch any mechanics, car repairmen or other employees to repair or rectify the conditions" alleged in paragraph #6 and #7 of the answers to interrogatories to the defendant, Erie Lackawanna Railway Company, that "the defendant, Erie Lackawanna Railway Company violated the provisions of 45 USC 23 and failed to comply with all applicable provisions of every federal, state and local law, rule or regulation pertaining to the operation and maintenance of railroad locomotives.

(605a, appendix E). The plaintiff in his answers to interrogatories to the defendant, Norfolk and Western Railway Company, made similar allegations in paragraphs #1, #7, #8 and #13 as to the failure of the defendant railroad to inspect, maintain and repair the locomotive.

The defendant railroads were on notice as to this claim of the plaintiff from the 30th day of January 1974 until the date of trial. They were also under a legal obligation imposed by Section 230.200(a) of Part 49 Code of Federal Reulations - Transportation, revised as of January 1, 1971, Sections 230.200 (a); 230.203; 230.204; and 230.203 (a) of 49 C.F.R. Transportation to make all necessary inspections, tests and repairs to all locomotives used on its line; and to file reports thereof (230.200(a); to see that all parts and appurtenances of every locomotive used must be maintained in proper condition (230.200 (a)); to perform a daily inspection of all locomotives used in yard service (230.203) and to file a report thereof in the terminal office where the inspection is made (230.203(a) whether or not repairs are needed (230.203); to indicate the number of the locomotive, the place, date and time of inspection, indicating any defects disclosed with name of employee making inspection; (230.204) and to correct all noted defects before said locomotive is used again (230.203(a)). These Federal regulations were in effect on June 22, 1971, the date of plaintiff's accident. If the railroad was complying with them, there would have been no problem in producing the subpoened records. It was percisely the failure and total neglect on the part of the railroad to follow any of these safety procedures requiring filing, inspection, maintenance

and repair of its locomotives on a daily basis that the plaintiff claimed constituted not only violation of the Federal Regulations but both negligence and violation of the Boiler Inspection Act, thereby contributing to plaintiff's being forced to work in an unsafe place and on a locomotive which constituted unecessary peril to his life and limb.

In the colloquy which concerned the railroads' response to plaintiff's subpoena, the court stated at (341a, 11 23 to 25), "I am looking at the subpoena duces tecum, and I wonder why if this plethara of reports are filed or required to be filed, why (342a -1-1) have we this puny production." The defendant railroads' counsel stated at (342a -1-4), "I have no idea." Defendants' counsel on numerous occasions openly admitted in court that he had no idea whether or not the railroad's personel attempted to comply with the subpoenas served. (342a 11 1-12) 343a - 11 10-12 & 18-24) (345a -11 4-5 & 10-15) or whether or not the reports were even kept and filed. (344a 11 1-13), (384a 11 12-18). In response to a question by the court concerning the subpoena served on the defendant, Norfolk and Western Railroad, defendant's counsel in answer to the following question of the court, (384a 11 7-11), "Within your knowledge, Mr. Griffin, what sort of records are maintained by the Norfolk & Western as to the whereabouts and utilization of a particular piece of equipment, such as this engine?" replied, (384a 11 12-14), "Your Honor, I frankly have no knowledge of that. I am not familiar with the procedures of the Norfolk and Western."

The Court was aware of the problem that the plaintiff was pointing

out with the defendants response to the subpoena but did nothing. At (345a 16-25) the Court stated to defendant's counsel,

> "You have to admit that the strong implication is that whoever made the search has not made a thorough search. The fact that four of these have jumped out of the blue is a pretty good indication that a lot more were on hand at some time.'

At (346a 15-22) the court in discussing this problem further with defendant's counsel stated:

> "There is a very strong indication...they knew that what Mr. Eggert is talking about occurred June 21 to 22 shift, so they again have particularly found and produced the inspection reports immediately before the time and immediately after that time. It looks to me like a very narrow response to the demand."

The problem of proof presented to the plaintiff in an F.E.L.A. case become insurmountable when the Court allows the type of conduct evidenced in the case at bar to take place. Defendant's counsel indicated to the court at the close of the trial on October 7, 1976, that he would check further into the question of defendants' compliance with the subpoena. On October 8th, 1976, seven days after having received the subpoena, counsel reported to the Court (375a 10-16) that:

> "we have made a check and find that the records that we had produced and the search that was made for these records was in the Buffalo Terminal, and that no search has exhaustively been made through the other parts of the Norfolk & Western terminals of the Erie Lackawanna."

Further testimony of the railroad claim agent, who received the subpoenas from the Superintendant of the defendant railroad and who was working under defendant counsel's direction indicated that

he did not see the subpoena until Monday, October 4, 1976, (388a - 1 23) and did not begin looking for inspection and repair records until Wednesday, October 6, 1976. (389a - 1 24) Under questioning by plaintiff's counsel, the claim agent testified further that he did not check any location except Buffalo, New York, (392a -11 10-15) eventhough he knew that the railroad maintained a major repair shop in Hornell, New York, approximately 90 miles from Buffalo.(349a - 11 10-13) The claim agent stated further that he never made any search for locomotive repair reports (397a 2-4).

Although plaintiff complained vigorously about the railroads' lack of compliance with the subpoena and expressed serious concern about the very suspect nature (p. 379 - lines 1-25) of the two inspection reports that were offered by the defendant which showed no defects on the locomotive for the morning of the accident, June 21, 1971 and the afternoon of the accident, June 22, 1971, the court allowed them into evidence despite a continued objection (427a lines 12-22) by plaintiff.

Plaintiff argued that in light of the fact that the railroad could find no other reports for April, May or June and could only locate those reports which concerned an accident of March 1971 and the accident concerning plaintiff, that the evidence was highly suspect, self-serving and unreliable and should be excluded under Rule 403 of the Federal Rules of Evidence, as unduly prejudice.(223a - lines 1-25) (224a - lines 1-10 (414a - lines 1-16) the court denied plaintiff's counsel's request and allowed these reports into evidence. At the

same time, the court denied plaintiff's counsel's request for a continuance (410a lines 17-25) in order to allow the defendant more time to search its records for the subpoened documents. Earlier in the trial, however, (308a lines 23-25) the court had indicated to defendants' counsel that a continuance would be granted to defendant in order to allow defendant an opportunity to prepare a defense to rebut plaintiff's testimony at trial that excess slack action contributed to plaintiff's injuries. The rulings of the Court effectively denied plaintiff's counsel access to important documentary evidence which could have established liability on the defendant while at the same time allowing defendant to introduce highly prejudicial and unreliable evidence dealing with the same subject, i.e., locomotive inspection reports that the defendant claimed it could not produce pursuant to plaintiff's subpoena. It is more than highly coincidental that the only two reports concerning locomotive inspection or repairs for the month of June 1971, produced by defendant showed no defects, expecially in light of the fact that testimony from both plaintiff (226a lines 1-25) and plaintiff's expert, Mr. Godwin, indicated (451a lines 5-7) that report forms were not readily available.

The suspect nature of defendant's response to plaintiff's subpoena duces tecum and offer of self-serving and unreliable evidence becomes more apparent when the request for locomotive inspection reports concerning an accident involving one Harold Parker, an employee of defendant railroad, who was injured on the same engine, N&W #2500, as a result of a defective front seat in March of 1971. This was the same seat that plaintiff claimed was defective when he was

injured. The plaintiff subpoened these railroad records in order to show that the defective seat was reported on March 6th, 7th, 9th and 11th (355a lines 11-19) and that on each incident, it was reported repaired (357 lines 7-21) on the back of the report by the railroad inspector, Mr. Valone. Plaintiff attempted to offer testimony of Mr. Parker who was injured due to the defective seat that for one entire week from March 6th to March 11th that he had reported the defective seat everytime a report form was available and that no repairs were made until after his injury, eventhough the back of each report showed the repairs made. This type of suspect reporting and negligent conduct on the part of the defendant railroad in failing to make necessary inspection and repairs was exactly what the plaintiff was claiming contributed to his accident and injuries. The plaintiff wanted to rebut the defendant's offer of proof that the defendant railroad reports of June 21st and 22nd were reliable and that any defects reported or noted would have been repaired. The court in denying the plaintiff the right to put these subpoened reports into evidence in order to attack their credibility and reliability through Mr. Parker's direct testimony and (357a line 22) in denying the plaintiff the right to call Mr. Parker as a rebuttal witness to prove their unreliability (383a lines 8-11) effectively denied plaintiff the right to substantiate his claim through direct evidence that the railroad failed to properly inspect, maintain and repair its locomotives. (359a lines 13-19).

The Court's colloquy with defendant's attorney at (347a lines 5-21) exemplifies the unrealiability and suspect nature of defendant's claim that it can not find any other revelant locomotive inspection reports or repair records concerning plaintiff's accident other than the two excupultatory ones while at the same time substantiating plaintiff's claim that indeed as a matter of practice reports, inspections and repairs records are not kept nor made by the defendants except when such proported reports might benefit the railroad in a F.E.L.A. action.

The defendants' attorney stated to the court that he did not know how or where the locomotive reports were kept. The court in referring to the Parker accident at (347 lines 5-6) asked:

> "How would that explain the production of the two reports in March of 1971".

Defendants' attorney responded at 347, lines 7-11:

> "Because I presume they went into a file that may be related to Parker and they were segregated there. I don't know but I would guess that these are not filed according to engine, Your Honor."

Lines 11-15 - The Court:

> "Parker said nothing in this report-there is nothing in the report that is made about the Parker accident, he makes no mention in there of any defect."

Line 16 - Defendants' Attorney:

> "As I say --

Lines 17-21 - The Court:

> "Out of what is there, there is no reason for anyone to particularly have taken an inspection report of the 7th and the inspection report of the 9th and pulled it out and kept it in a "Parker file."

Lines 22-25 - Defendants' Attorney:

> "I don't know if that is true or not, Your Honor, the Parker case - I don't know, I didn't handle the Parker case - I don't know what other contentions were made in the Parker case whether (348a lines 1-4) Parker made contentions in his case relative to anything, and somebody checked it out, I didn't handle that case."

Line 5 - The Court:

> "Do you have a statement from Parker?"

Line 6 - Defendants' Attorney:

> "Yes, I have a statement from Parker."

Defendants' attorney at (351a lines 1-4) under further questioning about the Parker reports stated:

> "That might be true, I agree with that, but in terms of the Parker situation, Parker's claim is there wasn't any seat at all or cushions."

At one point defendants' attorney denied knowledge about the Parker incident (347a lines 22-25) and at another indicated that he knew there was a claim about a defective seat. (347a lines 1-4). It can only be presumed that the locomotive inspection reports for the dates of March 6th, 7th, 9th and 11th were kept by the railroad because they indicated repairs were made to the engine and no defect was present. In fact, Parker would have testified that in spite of what the locomotive inspection reports showed, no repairs were made to N&W Engine 2500 during the time period concerned.

There is no need to go into a detailed legal analysis of the position of the Federal Courts as it regards the subpoena power. The past conduct of the railroad and the revelations at trial established good cause for the production of the requested documents. In Hanger v.

Chicago, Rock Island & Pacific Railroad Co., 216 F 2d 501, the Seventh Circuit implicity recognized that a plaintiff in an F.E.L.A. case could require production of documents and reports where technical questions involving locomotives and equipment are involved in the case. (See also Farr v. Delaware, Lackawanna and Western Railroad, D.C.N.Y. 47, 7 FRD 494) There was no justifiable reason put forth by the defendants for not making the subpoened records available. They were required by Federal Regulations to keep daily inspection and repair reports on all locomotives operated on their lines. The defendants as corporations are presumed to be in control of their own book and records, (In Re Eqt. Plan, 185 F. Sup 57, D.C.N.Y. 1960) and offered no substantial factual data as to the reasons why compliance with the subpoena duces tecum would be undulyburdensome. (Goodman v. U.S. (1966) 369 F 2d 166 and Horizons Titanum Corp. v. Norton 290 F 2d 421, Caswell v. Manhattan Fire (1968) 399 F 2d 417). The failure of defendants to properly respond to the subpoena duces tecum while at the same time offering unreliable, self-serving and suspect records of the very nature that they claimed were not available for plaintiff to discover, resulted in irreparable and harmful prejudice to plaintiff and prevented him from having a fair and equitable trial. The District Court's failure to honor plaintiff's request to:

1. either direct full compliance with the subpoena duces tecum; or
2. to grant a continuance until a valid attempt at compliance could be made; or
3. to deny admission into evidence of the self-serving, prejudicial and highly suspect locomotive reports proferred by defendant railroads in order to "put them in the clear," constituted reversible error and a new trail should be ordered.

POINT II

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ITS CHARGE TO THE JURY ON THE LAW APPLICABLE TO PLAINTIFF'S CASE.

The plaintiff presented his case against the defendant railroads in a two-pronged complaint, alleging a right to recover under:

1. The Boiler Inspection Act, 45 USC 23 et al; and
2. The Federal Employers' Liability Act, 45 USC 51 et al.

This Court has dealt exhaustively with the standards of proof that an injured railroad employee must meet in order to establish a cause of action under the above-named statutes. In Calabritto v. New York, New Haven and Hartford Railroad Company (2nd Circuit 1961), 287 F 2d 394 and more recently in Whalen v. Penn Central Transportation Company et al, (2 Cir. 1974) this Court has clearly held citing Lilly v. Grand Trunk Western R. Co., 317 US 481, that the Boiler Inspection Act requires that all locomotives and their parts and appurtenances be in "proper condition and safe to operate..without unnecessary peril to life or limb". This Court in line with the United States Supreme Court ruling in Lilly and Carter v. Atlanta & St. A.B.R. Co., 338 US 430, held that the statute imposes an absolute non-delegable duty on the railroad, unrelated to negligence, to see to it that all locomotives are in compliance with the statute. In Calabritto, this Court ruled that the presence of sand and oil located on a railroad locomotive can render it an unnecessary peril to life and limb and therefore in violation of the Congressional standard imposed under the Boiler Inspection Act. Likewise in Whelan, this Court held that the presence of ice on a locomotive can render it unsafe to operate in such a manner as to create unnecessary

peril to life or limb. The mere existence of a condition on a locomotive which causes unnecessary peril to life or limb is all that is required in order to establish a violation of the Boiler Inspection Act. Where this condition contributes "in any way no matter how slight" to the injuries sustained by an injured railroad employee. Rogers v. Missouri Pacific Railroad Co., 77 Sp. Ct. 443, liability will fall on the railroad. The plaintiff, in the case at bar, claimed that the presence of the defective seat and the protruding unguarded brake value on the locomotive created a condition which caused "unnecessary peril to his life and limb" and contributed to the injuries he sustained while working on locomotive N&W 2500. The District Court in charging the jury (535a lines 10-24) erroneously stated plaintiff's claim under the Boiler Inspection Act. The Court stated:

> "The basis for the lawsuit is plaintiff's claim that he was injured while performing his work duties for the defendant and he claims that the injury was a result of unsafe working conditions, in that on June 22nd he was thrown against an emergency brake valve in the engine cab, and he further alleges that if the front seat had swiveled properly he would not have attempted to rise from it, and thus the accident would not have occurred. He claims his injury was due solely and exclusively to the carelessness and negligence on the part of the defendant railway companies ... (our emphasis)

After giving the jury this erroneous view of plaintiff's case, the District Court then told them that they were bound by his declarations of law. (539a lines 5-6) At (540 lines 9-17) the District Court stated further that:

> "the plaintiff alleges that at the time and place in question the locomotive was defective, in that the front seat on the left of the fireman's side did not and would not function properly by swiveling freely and that an emergency brake valve was improperly located in the locomotive cab. He further states that the defective seat and the valve's location were causes of his injuries and consequent damages."

The above is simply a mistatement of plaintiff's claim under the Boiler Inspection Act. The plaintiff claimed that the conditions on the locomotive caused an unnecessary peril to his life and limb and contributed to his injuries and therefore a violation existed.

The Court further directed the jury to determine if the front seat was defective and whether the presence of such seat or the arrangement of the emergency brake valve was a violation of the statute. (542a lines 11-14). The District Court failed to indicate to the jury that the statute does not spell out specific violations but succintly states that any part of a locomotive or its appurtenances which causes unnecessary peril to life or limb and contributes in any way, no matter how slight, to plaintiff's injuries without regard to negligence, constitutes negligence per se and is a violation of the statute. The Court then went into a general discussion of common law negligence and charged the jury that:

> "Negligence requires both the foreseeable danger of injury to another, and conduct unreasonable in proportion to the danger. (544a lines 22-25) A person is not responsible for the consequence of its or his conduct unless the risk of injury was reasonably foreseeable. Tne exact injury occurrence or the precise injury need not have been foreseeable, but some injury as a result

> of negligent conduct must have been not merely possible but probable. If a reasonably prudent person could not foresee any injury as a result of his conduct or if his conduct was reasonable in light of what he could foresee, then there was no negligence." (54[illegible]a lines 1-12)

The District Court mistated the law as applied under the F.E.L.A. and instead charged a common law standard of negligence and probable cause which conflcits with the Supreme Court standards ennuciated in Rogers and Lilly and followed by this [illegible]urt in its original decision in this case reported at 538 F2d 509 (1976). Adding to the misdirection of the jury brought about by erroneous statement of the law, the District Court further erred by intermingling plaintiff's cause of action under the Boiler Inspection Act with his cause of action under the F.E.L.A. The Court stated at (547a lines 6-16):

> "If you find, as the plaintiff claims, there was a defective condition or situation existing in and about the place he was working which created a risk of unnecessary or unnusual danger to him, and the railroads officers, agents or employees knew or in the exercise of reasonable diligence should have known of any such condition or situation, then this knowledge is imputed to the defendant railroads or to the particular defendant."

The Court continued this intermingling of plaintiff's two separate causes of action into a common law negligence action at (548a lines 9-16) and further charged the jury that:

> "If you find the injuries sustained by the plaintiff were not caused or brought about by any negligent act or failure to act on the part of the defendant railroad or by any of either the agents, servants or employees, then you must find the particular defendant railroad was not negligent."

Again at (549a lines 1-4) the Court misleads the jury and erroneously mistates plaintiff's claims. The Court stated: "Not, not providing a safe place to work is the essence of plaintiff's claims and yet that ommision more understandably relates to alleged negligence. (our emphasis)

Not providing a safe place to work is a part of plaintiff's one claim under the F.E.L.A., it is not the essence of his claim under the Boiler Inspection Act.

The failure of defendants to provide him with a locomotive which was safe to operate "without unnecessary peril to life or limb" is the essence of plaintiff's second claim under the Boiler Inspection Act. In charging the jury otherwise, the District Court committed reversible error. Again at (550a lines 1-11) the District Court mistated and obfuscated plaintiff's claim under the Boiler Inspection Act with his claim under the F.E.L.A. the Court in referring to plaintiff stated that:

> "He contends that the defective seat and the allegedly protruding valve constitute negligence in not providing a safe place to work..you are the judges whether a place to work is safe. Defendants, however, need only act reasonably. They must perform as a reasonable person or persons running a railroad would act."

This is an erroneous statement of the law and plaintiff's claim as it relates to a violation of the Boiler Inspection Act. Negligence and the reasonable man standard is wholly inapplicable with regards to plaintiff's claimed violation of that statute by the defendants. Plaintiff claimed that the railroad was negligent under the F.E.L.A. in that:

1. The railroad and/or its agents failed to properly inspect, repair and maintain its locomotive equipment; and

2. in that the railroad or its agents failed to operate the locomotive in a fair and prudent manner thereby causing excessive slack action on the morning of June 22, 1971; and

3. in that the railroad and/or its agents failed to perform the switching movement in a safe and prudent manner with the proper amount of air and brakes applied to the cars, thereby causing plaintiff to sustain injury as a result of being thrown about the cab of the engine.

The District Court at (553a lines 4-10) again intermingles the plaintiff's two causes of action and erroneously charges that:

> "Now stated another way, an act or omission or violation is the cause of injury or damage if the injury or damage would not have happened but for the act or omission, even though the act or omission combined with other causes. (our emphasis)

Both the United States Supreme Court and this Court have stated that the "but for" and "probable cause" tests are not to be applied to claims under the Boiler Inspeciton Act or the F.E.L.A. As the U. S. Supreme Court succinctly stated in Rogers, the question for the jury in an F.E.L.A. case is "whether, with reason the conclusion may be drawn that negligence of the employed played any part at all in the injury or death." (352 US 508). Also in Rogers at 352 US 508, footnote #13, the Supreme Court stated that "proof of violation of certain safety appliance statutes without more proves negligence and also eliminates contributory negligence for any purpose. (Citing Carter v- Atlanta & St. ABR Co., 338 US 430 and Myers v. Reading Co., 331 US 477)

The plaintiff at (577a lines 23-25 and 578a lines 1-25) took exceptions to the errors in the District Court's charge, for the reasons which are more fully explained above.

The proof of the pudding which substantiates plaintiff's points raised above is the jury's reply to the Court, at 583a lines 2-5). The jury after reporting its finding of no cause of action for negligence (582a line 25 and 583a line 1)informed the Court, after inquiry by the Court, that it never considered plaintiff's claim based upon the Boiler Inspection Act. (583a lines 2-5)

The jury was sent back by the Court for further deliberations. They returned within thirty minutes and asked for a "clarification of points to consider concerning labor law" (sic)(584a lines 15-16). At this point, the Court attempted to re-charge the jury as to the plaintiff's cause of action under the Boiler Inspection Act. The plaintiff again suggested that the Court use interrogatories to the jury to help clarify the issues, but the Court refused. (585a lines 1-5) The Court's serious errors in its initial charge and the total confusion it engendered, constituted reversible error, highly prejudicial to plaintiff's case. The decision of the jury based upon the erroneous and misrepresented statements of law given by the District Court should be reversed and a new trial ordered.

POINT III

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING RELEVANT EVIDENCE OFFERED BY PLAINTIFF TO SUBSTANTIATE HIS CASE.

In originally reversing and remanding this case back to the District Court, the majority of this Court ruled at 538 F 2d 512, that the "District Court also erred in excluding evidence which tended to establish plaintiff's claim set forth in his complaint and interrogatories." The District Court committed the same reversible error during the second trial of this action. Plaintiff in his complaint and answer to interrogatories, to the defendant, Erie Lackawanna Railway Company, alleged at paragraphs #6 and #9 and to the defendant, Norfolk and Western Railway Company, alleged at paragraph #1 and #13 that "the defendant failed to provide plaintiff with safe equipment; did order plaintiff to work with an unsafe engine; and did fail to properly inspect, repair and maintain locomotive N&W #2500. These allegations formed a substantial part of plaintiff's claim against the defendant under the F.E.L.A. Referring to the 6th Circuit's decision in Rodriquez v. Delray Connecting Railroad, 473 F2d 819, which also recognizes the liberality accorded plaintiff's cases in an F.E.L.A. action and additionally makes reference to Dean Prosser's observation that jury verdicts "for the employee can be sustained upon evidence which would not be sufficient in the ordianary negligence action".(473 F 2d 820) This Court directed the District Court to allow plaintiff to offer evidence which was relevant to his claim. However, when plaintiff attempted to offer both direct testimony to substantiate his claim that the defendant failed to properly inspect, maintain and repair its locomotives and also to rebutt the inference professed by the defendants

that said locomotives were inspected, maintained and repaired, the District Court refused to allow the evidence or testimony in. This evidence which was properly admissible under both Rule 401 "Revelant Evidence" of the Federal Rules of Evidence and Rule 406, "Habit; Routine Practice: of the Federal Rules of Evidence, was ruled inadmissible as a matter of law by the District Court. (330a lines 1-7)

The plaintiff made an offer of proof at (330a lines 9-25) (331a lines 1-25) and (332a lines 1-25) through direct testimony of an employee injured on the same engine, N&W #2500 as plaintiff under similar circumstances, which would show that the defendants did not inspect, repair or maintain its locomotives, thereby causing them to be in an unsafe condition and not safe to work on. The plaintiff stated that Engineer Parker, also employed by defendant, would testify to the fact:

1. that the railroad failed to properly inspect, repair and maintain its locomotives;

2. that he was injured approximately three months before plaintiff on the same locomotive N&W #2500 due to the same front seat being defective, although in a different manner;

3. that the defendant railroads had accident reports which did not show the seat being defective, although it was defective at the time of his injury (328a lines 12-25 and 329a lines 1-25);

4. that Engineer Parker reported the defective seat on five consecutive occasions, the first being April 6, 1971;

5. that although the defect was reported by Engineer Parker,

the defendant railroad failed to make any efforts to inspect or repair the defect until such time as Engineer Parker sustained an injury;

6. that on several occasions as evidenced by the locomotive inspection reports subpoened by plaintiff and filled out by Engineer Parker, that the defendant railroads reported on the back of the reports that the seat had been repaired, when, in fact, it had not; (355a lines 11-18)

7. that it was the custom and practice of the defendant railroad not to make such inspection and repairs eventhough said repairs and inspections were made; (356 a lines 4-9) and (357a lines 7-21) and to further prove plaintiff's contention that the locomotive reports submitted by defendants to establish no defects to the front seat of N&W locomotive #2500 on the morning and afternoon of June 21st, 1971 and June 22, 1971 were highly suspect and misleading.

Plaintiff's counsel discussed this offer of proof and Engineer Parker's testimony with the court on several occasions during the trial. At (357a lines 7-21) plaintiff's counsel in referring to the locomotive inspection reports relative to Parker's injury which were produced under subpoena by the defendant stated:

> "It has a defective seat, it has the same signature there, Mr. Valone, who is an air brake inspector, according to the designation down below. He signed under Column C and on the back it says, "Column C". The workman who works upon and properly finishes on item of work reported in Column B shall evidence the fact that he has done so by signing his name opposite such item in the space provided for his signature in Column C. So Mr. Valone three days in a row states that he has worked on that, and we wanted to bring in Mr. Parker to say there wasn't

a seat for a period of a week, while they are stating they are finishing the work."

The Court: (line 22):

"No, there is no pertinency".

Plaintiff;s Counsel: (lines 23-24):

"It is evidence of past conduct of the railroad, negligent conduct, a violation of the federal laws."

The Court (358a lines 1-2):

"In a way that has nothing to do with this particular event."

Plaintiff's Counsel (lines 3-7):

"Your Honor, it shows the conduct of the railroad over a period of time and the allegations in the interrogatories is that they didn't assign any workmen to repair the seat, they didn't fix the seat, they didn't maintain the seat..."

The Court (359 a line3)

"Not the same defect.

Rather than allow the plaintiff to put in revelant evidence to make the existence of facts that are of consequence to the determination of the action more probable or less probable than it would be without the evidence, (Rule 401 of F.R. of E.) and to prove the conduct of the defendants on this particular occasion was in conformity with the habit or routine practice of the past (Rule 406 of F.R. of E.) the court refused to allow the plaintiff to present the evidence. This ruling on the part of the District Court was highly prejudical to the plaintiff, prevented the truth from coming out and was in direct conflict with the ruling of this Court, in the original decision of reversal and reprimand. The clearly erroneous action of the District Court constituted reversible error and a new trial should be granted.

POINT IV

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN DENYING PLAINTIFF'S REQUEST TO CHARGE AND IN DENYING PLAINTIFF'S REQUEST FOR INTERROGATORIES TO THE JURY.

A review of the discussion between the court and plaintiff's counsel contained in (pp. 254a to 276a) concerning the distinction between plaintiff's claimed violation of the Boiler Inspection Act and plaintiff's claimed violation of the F.E.L.A., will reveal that the District Corut was not sure as to the distinction between the two causes of action and as to the law to be applied. At (284a lines 4-5) the Court in discussing the F.E.L.A. stated that "proximate cause has to be there, it hasn't been thrown out." The court then stated in referring to the Supreme Court decision in Rogers, "they might have thrown out the element of foreseeability" (284a lines 24-25) This basic element of uncertainity and inconclusiveness on the part of the District Court concerning the Federal law to be applied under the Boiler Inspection Act and the F.E.L.A. induced plaintiff to draw up requests to charge.

The plaintiff also requested the Court to charge applicable sections of 49 Code of Federal Regulations, Parts 230.00 et al, which dealt with the Federal obligation on the part of all railroads to inspect, maintain, repair and to file daily reports concerning the condition and repair of locomotives on their line. Pursuant to 44 U.S.C. 1507, this Code is subject to judicial notice by the Court. The plaintiff requested this charge in order to raise to the jury the question of whether or not the defendants complied with their legal obligations or duties as contained in the Codes. It was plaintiff's position that defendants' failure to produce most of the subpoened documents and also defendants' failure to produce testimony from any competent witnesses as to the daily

locomotive inspection, maintainance and repairs performed by defendant, would focus jury's attention on the issue alleged in plaintiff's interrogatories that indeed the defendants negligently failed to perform any of these acts. The Court (527a lines 5-23) in denying plaintiff's request to charge numbered (e), (f), (g) erroneously stated that the question of failure to make necessary locomotive inspections and repairs was not in the case when in fact plaintiff had pleaded it in his interrogatories and had attempted to offer proof as to these allegations in his F.E.L.A. (607a appendix 9) case. Plaintiff's contention was that defendents' negligent failure to make the necessary inspections and repairs allowed N&W locomotive 2500 to remain in an unsafe condition. The Court committed reversible error in denying plaintiff's request to charge the Federal regulations and should have allowed the jury to consider whether violation of the regulations constituted permissible infriances of negligence. (See Flour Corp. v. Blake, 338 F 2d 830; 29 Am Jur. 2d, Evidence, sec. 443)

The plaintiff also propounded interrogatories (611a appendix H) to the jury, which were arbitrarily denied by the Court (531a line 6) The plaintiff realizing the complexity of the issues involved in trying the claim of the Boiler Inspection Act violation together with the claim of a violation of the F.E.L.A., attempted to have the jury decide important factual issues concerning the Boiler Inspection Act violation before consideration of the F.E.L.A. claim of negligence. Even after the jury indicated to the Court that it had not considered the factual issues which would have been dispositive of the Boiler Inspection claim,

the Court still refused to use the interrogatories proposed by the plaintiff. (585a line 4) This refusal by the Court to use the interrogatories resulted in undue prejudice to plaintiff. The Court's action prevented the plaintiff from having the jury determine essential factual issues in a simplified manner which were germane to the plaintiff's legal claim under the Boiler Inspection Act. (See Stacey v. Illinois Central, 491 F 2d 542; National Bank of Com. v. Royal, 455 F 2d 892; Gough v. Rossman, 487 F 2d 373.)

In Skidmore v. Baltimore & Ohio R. Co. (CCA 2d 167 F2d 54, cert den. 335 US 816, the court recognized the soundness of presenting written interrogatories to a jury in civil cases. In the case at bar, interrogatories would have appraised the jury of essential fact questions which had to be answered in order for the jury to determine whether or not a violation of the Boiler Inspection Act had occured as plaintiff alleged as one part of his cause of action. Having resolved this issue initially, the jury could then have either returned a verdict for plaintiff or could have gone on to the question of whether or not the defendants violated the F.E.L.A. which was part two of plaintiff's cause of action. In not allowing for this type of factual determination by the jury, pursuant to interrogatories, and in charging complex areas of law to the jury, with no instructions as to the requirements for specific factual findings, the Court committed reversible error and the plaintiff is thereby entitled to a new trial (See Albergo v. Reading Co., CA Pa. 1966, 372 F2d 83, cert. denied 87 S Ct. 1284, 18 L Ed 2d 232.)

POINT V

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN EVALUATING AND CHARACTERIZING THE PLAINTIFF'S EVIDENCE AS "SLIM".

The Court in its charge to the jury committed reversible error by commenting on the weight of the evidence presented by the plaintiff with regards to the claimed violation of the F.E.L.A. The Court stated in referring to plaintiff's evidence as to an abrupt stop made by fireman Kendall, which contributed to excessive slack action and the jolt which knocked down the plaintiff that"the evidence on this is slim". (554a lines 13-14) Commenting further on the evidence offered by the plaintiff as to the lack of air in the railroad cars and the effect that it would have on excessive slack run in, which plaintiff claimed was negligence and contributed to his accident. The Court stated, "Again, the evidence that there should have been air in the cars is slim".(555 lines 1-2)

The Court failed to advise the jury that it was not bound by the Court's analysis of the weight and credibility to be attributed to the evidence presented by plaintiff. The Court had a legal duty to either refrain from quanitatively analyzing the evidence and characterizing it as "slim" for the jury or in the alternative to clearly and unequivocally advise them that the Court's comments on the evidence were not binding. (Brewster v. Boston Herald et al 188 F Sup 565, Lambert v. Duzy 286 F Sup 670). The failure on the part of the Court to advise the jury that it could disregard the Court's analysis of the evidence constituted prejudical and harmful error. (Graenu vs. Green 460 F 2d 1279; Kornicki v. Coleman et al, 460 F 2d 1134. Again the Court as it had done in

plaintiff's first case usurped the basic function of the jury and invaded its province as the sole body for the determination and analysis of all the facts presented by either party during the trial of the lawsuit. This action on the part of the Court effectively removed the consideration of the weight to be accorded plaintiff's testimony from the province of the jury. By characterizing the evidence as "slim" the court deprived the plaintiff of his fundamental right under the F.E.L.A. to have a jury of his peers decide the crucial factual issues and ascribe the weight to be accorded to the evidence presented by plaintiff to substantiate his claim under the F.E.L.A. against the defendants. This improper action on the part of the District Court effectively denied plaintiff an intergral part of his rights under the statute and the Court's comments negated the remedial effects intended by Congress in legislating a right to a jury trial for all injured railroad employees and therefore a reversal of the jury verdict and new trial is in order. (Rogers vs. Missouri Pacific, 77 S. Ct. 443, Eggert v. Norfolk and Western, et al 538 F 2d 509.

CONCLUSION

The District Court committed serious reversible errors in the trial of plaintiff's lawsuit and therefore for all the reasons as more fully set out in this brief, the decision of the jury, duly rendered in this case on October 13, 1976 and duly filed in the Office of the Clerk for the Federal District Court for the Western District of New York on October 14, 1976, must be reversed and a new trial granted.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: Thomas W. Eggert
vs
Norfolk & Western Railway Co. et ano

No. 76-7567

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 2nd day of May, 19 77 I mailed ____ copies of a printed Brief & Appendix in the above case, in a sealed, postpaid wrapper, to:

10 copies to: A. Daniel Fusaro, Clerk
United States Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies to: Moot, Sprague, Marcy, Landy, Fernbach & Smythe
Att: Richard F. Griffin, Esq.
2300 Erie County Savings Bank Building
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:
Collins, Collins & DiNardo, Att: John F. Collins, Esq.

464 Statler Hilton, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this
2nd day of May, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 78